

## LEASE AGREEMENT

**THIS LEASE AGREEMENT** (hereinafter "**Agreement**") is entered into this 26th day of September, 2006, by and between the **City and County of Broomfield**, a Colorado Municipal Corporation and County (hereinafter "**Broomfield**") and the **Department of Energy of the United States of America** (hereinafter "**DOE**"). Broomfield and DOE agree as follows:

**WHEREAS** DOE has discontinued operations, completed decommissioning and decontamination, and successfully completed physical environmental remediation of a manufacturing facility formerly known as the Rocky Flats Environmental Technology Site (RFETS) in Jefferson County, State of Colorado, and is bound by law to transfer a majority of RFETS to the United States Fish and Wildlife Service for use as a wildlife refuge; and

**WHEREAS** DOE, the regulatory agencies with oversight at RFETS (which includes the United States Environmental Protection Agency [hereinafter "EPA"] and the Colorado Department of Public Health and the Environment [hereinafter "CDPHE"]), and local stakeholder organizations in the area currently deem it advisable that surface water which gathers on the site should be controlled and tested before allowing said water to flow into the natural and artificial water courses of the area; and

**WHEREAS** DOE has implemented a system of holding ponds for the purpose of controlling and testing surface water which collects on the site; and

**WHEREAS** the water law and regulations of the State of Colorado require that stream depletions resulting from out-of-priority storage of water be replaced; and

**WHEREAS** DOE's intent in entering into this agreement with Broomfield is to comply with the water law and regulations of the State of Colorado as they apply to the holding ponds at RFETS; to control and test the water that flows through the holding ponds at RFETS in the manner agreed upon by DOE, EPA, and CDPHE; and to provide Broomfield with means to replace depletions to Walnut Creek resulting from out-of-priority storage of water in the holding ponds at RFETS;

**THEREFORE, Broomfield and DOE agree as follows:**

1. **Water to Be Leased.** Broomfield hereby agrees to lease to DOE a certain amount of Broomfield's reusable Windy Gap effluent set forth in paragraph no. 2, to be measured at one or more of the measuring points more particularly described below in paragraph no. 4 and released to the Big Dry Creek Basin to replace depletions resulting from out-of-priority storage in certain holding ponds at RFETS pursuant to, first, a State Engineer's Office (SEO)-approved Substitute Water Supply Plan (SWSP), and, second, a court-approved plan for augmentation. The location of said holding ponds is set forth below in paragraph no. 5.

2. **Amount of Water.** The number of acre-feet to be supplied on behalf of DOE by Broomfield in any calendar year shall be determined by the total amount of out-of-priority storage by the holding ponds, not to exceed two hundred eighty two (282) acre-feet in a given year, with a maximum 10 year running average of 120 acre-feet per year. In addition, DOE shall be entitled to lease, on an annual basis and at market rates, subject to availability, up to an additional 100 acre-feet of water in order to augment unanticipated needs. Any water leased on this annual basis shall not be accounted against the 10 year running average.

- a. **Data Collection** – The parties hereto understand that the protocols for data collection and transmittal will be subject to approval or modification during the course, first, of an administrative proceeding for approval of a SWSP and, second, of a judicial proceeding for approval of a plan for augmentation. The following descriptions for data collection and reporting (paragraphs 2b through 2d) represent the methodology DOE intends to propose in the aforementioned proceedings, but substantial modifications to these protocols may be required and shall not constitute a breach of this agreement.
- b. **Monthly Report** – On the first business day of each month, or as soon thereafter as possible when unavoidable circumstances prevent reporting on the first business day, water volume data for all of the Walnut Creek basin ponds will be transmitted electronically from DOE to Broomfield in a standardized report. Ponds A-3, A-4, and B-5 will have their pool levels measured using automated monitoring equipment connected to a telemetry system that transmits the data to a central computer. The remaining ponds operated by DOE in the Walnut Creek basin, including A-1, A-2, B-1, B-2, and B-3, will have their pool levels measured once per month by visual reading of a staff gauge, with the exception of Pond B-4 and the Landfill Pond, which will not be measured regularly because their pool levels are relatively constant as a result of their flow-through operating protocol. The report will quantify the amount of change in water volume stored for each of the ponds since the prior report.

In addition, the monthly report will include an estimate of evaporative losses for the preceding month for all Walnut Creek basin ponds. The evaporation estimate will be based on the mean pool elevation of each pond during the prior month, the corresponding mean pool area for the prior month (derived from stage-area curves for each pond), and gross evaporation rates for the RFETS area published in the Evaporation Atlas for the Contiguous 48 United States (NOAA Technical Report NWS 33), 1982 (see Appendix A) and using the Colorado SEO standard procedure for determining monthly net evaporation. The monthly gross and net evaporation volume for each pond will be transmitted electronically from DOE to Broomfield in a standardized report.

- c. **Biweekly Report (Ponds A-3, A-4, and B-5 only)** - On the first business day two weeks following the monthly report, or as soon thereafter as possible when unavoidable circumstances prevent reporting on that day, water volume data from Ponds A-3, A-4, and B-5 will be transmitted electronically from DOE to Broomfield in a standardized report. The report will quantify the amount of change in water volume stored for each of the three ponds since the prior report, as well as the estimated evaporative losses during that time period.
- d. **Special Report for Conditions with Increased Storage (Ponds A-3, A-4, and B-5 only)** - During wet conditions when a specified threshold increase of 1 acre-foot (threshold quantity to be approved by the water administration officials or by the water court) or more in water volume stored in the RFETS ponds has occurred during the prior day, data will be transmitted from DOE to Broomfield in the following manner:

Within one day following an increase-in-storage event that equals to or exceeds the threshold magnitude, or as soon as is reasonably practicable, water volume data from

Ponds A-3, A-4, and B-5 will be transmitted electronically from DOE to Broomfield in a standardized report. The report will quantify the amount of change in storage volume for each of the three ponds since the day before the increase-in-storage event began. Daily reports of the changes in storage will continue to be transmitted electronically from DOE to Broomfield until the daily increase in storage volume is less than a specified amount (to be determined by administrative officials or through a judicial proceeding), on which day a standardized end-of-event report will be transmitted from DOE to Broomfield, including the beginning and ending dates of the event, the total measured increase in storage and the total estimated evaporation loss that occurred during the event period.

**3. Frequency of release of water on behalf of DOE.** Broomfield will release the leased water in accordance with a court-approved augmentation plan or a State Engineer-approved Substitute Water Supply Plan ("SWSP"). DOE shall be responsible for obtaining any water court decrees and/or SWSP approvals required for operation under this Agreement.

**4. Location of the release and measuring facilities.** On behalf of DOE to meet DOE's obligations to replace depletions from out-of-priority storage, Broomfield may release and measure reusable Windy Gap water at any of the facilities named and described as follows, so long as the point of release is located to offset out-of-priority depletions above the calling senior water right (unless the calling water right is Great Western Reservoir itself), and the substituted water is of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used:

- a. Great Western Reservoir located in the North  $\frac{1}{2}$  of Section 7 and South  $\frac{1}{2}$  of Section 6, Township 2 South, Range 69 West of the 6<sup>th</sup> Principal Meridian. Stored reusable Windy Gap water may be released and measured at the dam toe drain with a v-notch weir, and outlet releases are currently measured with a 3-foot Parshall Flume;
- b. Broomfield Wastewater Treatment Plant discharge point is located in the Southeast  $\frac{1}{4}$  of Section 32, Township 1 South, Range 68 West of the 6<sup>th</sup> Principal Meridian. Discharged effluent is currently measured using an ultrasonic flow meter;
- c. Broomfield's Windy Gap lawn irrigation return flows that return to Big Dry Creek. These returns will only be used as a supply after a quantification method has been approved by the Division 1 Engineers Office or Division 1 Water Court. Broomfield will seek to have its lawn grass return flows quantified by 2010; and
- d. Future storage reservoirs in which reusable Windy Gap water may be stored.

**5. Holding ponds location.** The holding ponds pertinent to this Lease Agreement at RFETS are located above Great Western Reservoir in the Walnut Creek drainage, at points more specifically described as follows:

- a. Pond A-1 is located in the northwest quarter of the northeast quarter of Section 11, Township 2 South, Range 70 West of the 6<sup>th</sup> Principal Meridian.
- b. Pond A-2 is located in the northwest quarter of the northeast quarter of Section 11, Township 2 South, Range 70 West of the 6<sup>th</sup> Principal Meridian.

- c. Pond A-3 is located in the northeast quarter of the northeast quarter of Section 11, Township 2 South, Range 70 West of the 6<sup>th</sup> Principal Meridian.
- d. Pond A-4 is located in the southwest quarter of the southwest quarter of Section 11, Township 2 South, Range 70 West of the 6<sup>th</sup> Principal Meridian.
- e. Pond B-1 is located in the southwest quarter of the northeast quarter of Section 11, Township 2 South, Range 70 West of the 6<sup>th</sup> Principal Meridian.
- f. Pond B-2 is located in the southeast quarter of the northeast quarter of Section 11, Township 2 South, Range 70 West of the 6<sup>th</sup> Principal Meridian.
- g. Pond B-3 is located in the southeast quarter of the northeast quarter of Section 11, Township 2 South, Range 70 West of the 6<sup>th</sup> Principal Meridian.
- h. Pond B-4 is located in the southeast quarter of the northeast quarter of Section 11, Township 2 South, Range 70 West of the 6<sup>th</sup> Principal Meridian.
- i. Pond B-5 is located in the northwest quarter of the northwest quarter of Section 12, Township 2 South, Range 70 West of the 6<sup>th</sup> Principal Meridian.
- j. The Present Landfill Pond is located in the southwest quarter of the southwest quarter of Section 2, Township 2 South, Range 70 West of the 6<sup>th</sup> Principal Meridian.

Said holding ponds are also known as the Walnut Creek basin ponds. Other RFETS ponds, known as the Woman Creek basin ponds, are not covered by this Agreement.

**6. Term of Lease.** The term of this lease shall be for thirty (30) years, commencing September 30, 2006, and ending September 30, 2036.

**7. Payment.** DOE shall pay two million four hundred thousand dollars (\$2,400,000) to Broomfield on or before October 30, 2006, as consideration for this Lease Agreement.

**8. Leasehold Interest Only.** All water furnished by Broomfield under this Agreement is on a leasehold basis only. DOE shall have no right to make a succession of uses of water delivered under this Agreement after discharge from the Walnut Creek basin ponds and all dominion over the unconsumed water provided hereunder reverts completely to Broomfield. All property rights to the water furnished hereunder are reserved in and to Broomfield.

**9. Release of water from holding ponds by DOE.** DOE will operate the ponds, including sampling and releasing water, in accordance with the requirements of the following documents:

- The Resource Conservation and Recovery Act Corrective Action Decision/Comprehensive Environmental Response, Compensation and Liability Act Record of Decision for Rocky Flats; and,
- The long-term regulatory agreement for Rocky Flats management among the DOE, CDPHE, and the EPA.

DOE contemplates it will release water stored in the A- and B-Series ponds after: 1) the pond levels reach a predetermined percentage of capacity that would normally cause initiation of the release process, and 2) the water that will be released to flow off the site has been sampled and tested in accordance with the plans listed above. During routine operations, water will be released from Ponds A-4 and B-5 until they are drawn down to approximately 10 percent of their individual capacities.

- a. If the released water is acceptable to Broomfield in Broomfield's sole discretion, said water may be captured by Broomfield in Great Western Reservoir for any use decreed or otherwise allowed to Broomfield.
- b. If the water is not acceptable to Broomfield, Broomfield may route said water away from the Great Western Reservoir.
- c. Broomfield may request that water stored in ponds A-4 or B-5 be released to facilitate operations at Great Western Reservoir if either Pond A-4 or B-5 is filled to at least 20 percent or more of its individual capacity. If the request is implemented by DOE, the water to be discharged from the pond will be sampled and released in accordance with protocols specified in the documents referenced above. During such operations, water will be released from Ponds A-4 and B-5 until they are drawn down to approximately 10 percent of their individual capacities.

DOE will attempt to facilitate the requested release, provided that the release does not conflict with pond operation protocols, regulatory requirements, or violation of water quality standards. However, failure to honor the request will not constitute a breach of this agreement.

**10. Extension or Renewal of This Lease.** At the option of DOE, this Lease Agreement may be renewed for up to an additional 30 year term upon the same terms and conditions as contained herein, subject to written agreement of the parties on payment for the additional term. DOE shall give Broomfield written notice of its intent to renew the Lease Agreement not less than 180 days prior to the term of the lease set forth in paragraph 6.

**11. Termination.** Except as otherwise provided herein, this Lease may be terminated only under the following circumstances:

- a. By either party, with cause (including a breach of this Lease by the other party beyond any notice and cure period), immediately upon written notice to such party.
- b. In the event of such termination by DOE, other than for any breach hereof by Broomfield, no refund of payments previously made to Broomfield shall be due from Broomfield.
- c. If Broomfield terminates this Lease, other than for any breach hereof by DOE, a refund payment from Broomfield to DOE shall be calculated as follows: the percent of time remaining at the time of termination on this lease under its original terms shall be calculated by dividing the number of years, or parts of years, remaining on the Lease at the time of termination by thirty years, and the resulting percentage shall be applied to the initial \$2,400,000 payment, and the resultant percentage of said payment shall

be refunded to DOE, less all expenses incurred by the City in connection with or as a result of the termination.

- d. If the final determination of the State of Colorado Water Court with respect to the Application filed by DOE seeking approval of the SWSP and Augmentation Plan and request for storage rights in the holding ponds at RFETS renders it impossible for DOE to fulfill its intent in entering into this Agreement with Broomfield, as expressed above, DOE may opt to terminate this Agreement. If DOE terminates this Agreement under these circumstances, Broomfield shall refund to DOE the *pro rata* portion of the payment referenced in paragraph 7 of this Agreement. The *pro rata* portion of the payment shall be calculated in the manner set forth in paragraph 11c of this Agreement.

**12. Approvals and Decrees.** DOE shall be responsible for obtaining the necessary approvals for the use by DOE under this lease of the leased water from the Northern Colorado Water Conservancy District and any of its Subdistricts, the Division Engineer, and the Water Commissioner, the Colorado State Engineer, and the Water Court for Division 1. DOE shall be solely responsible for obtaining the water court decrees for any plans of augmentation or exchange, or both, needed to make use of the water leased under this Agreement. DOE shall bear its costs of obtaining the approvals and decrees described in this paragraph. Should Broomfield intervene or otherwise participate in any proceedings necessary to obtain the approvals and decrees described in this paragraph, Broomfield will bear its own expenses incurred in doing so.

**13. No Adverse Legal Position.** DOE and Broomfield agree not to take legal positions adverse to each other with respect to the water which is the subject matter of this Agreement.

- a. DOE agrees that during the term of this Lease, it will not take a legal position adverse to Broomfield in connection with the operation or administration of Broomfield's water interests in the Leased Water, except as may be necessary to enforce the terms of its Lease rights herein. DOE and Broomfield agree that Broomfield shall have the right to seek judicial modification of the Leased Water during the term of this Lease as it may find necessary for its uses of that water subsequent to the expiration of the Lease term. Broomfield agrees that if such judicial modification is sought that action shall not interfere with DOE's rights under this Lease during the Lease term. So long as any such judicial modification does not interfere with DOE's rights under the Lease during the Lease term, DOE agrees to cooperate with Broomfield in the prosecution of any such judicial proceeding.
- b. Broomfield agrees that during the term of this Lease it will not take a legal position adverse to DOE if and when it applies for approval of plans of augmentation or exchange, or both, in water court, or when DOE applies for substitute water supply plans, so as to make use of the water which is the subject of this Agreement for its intended purpose of replacing evaporative losses and out-of-priority storage in the Walnut Creek basin ponds.

**14. Assignments.** Neither party shall assign or convey any rights or obligations under this lease without the prior written consent of the other party.

15. **Integration.** This Agreement contains the entire agreement between the parties and no statement, promise or inducement made by any party hereto or the agent thereof that is not contained in this Agreement shall be valid or binding.

16. **Severability.** In the event that any terms, covenants or conditions of this Agreement or their application shall be held invalid as to any person, corporation or circumstance by any court having jurisdiction, the remainder of this Agreement and the application and effect of its terms, covenants or conditions to such persons, corporations or circumstances shall not be affected thereby.

17. **Limitations.** The obligations of each party hereunder are subject to the limitation that if by reason of *force majeure* either party is unable in whole or in part to carry out this Agreement, that party shall not be deemed in default during the continuance of such disability. The term "*force majeure*" as used herein shall mean the following: acts of God; strikes; lockouts or other similar labor actions; acts of public enemies; orders or restraints of any kind of the federal, state or local governments (not including Broomfield or DOE) or quasi-governmental entities or any of their departments, agencies, or officials or any civil or military authority, insurrections; riots; natural disasters; explosions; breakage or accident to machinery, reservoirs, transmission pipes or canals; or any other cause not reasonably within the control of the parties.

18. **Compliance with Laws.** With respect to this Agreement:

- a. DOE and Broomfield shall comply with any and all applicable federal, state, local or agency laws, regulations, rules, ordinances or other directives, and
- b. DOE shall obtain releases, licenses, permits or other authorizations if required by a governmental body or authority.

19. **Breach.** Breach of this contract shall consist of failure by a party to observe or perform any of its obligations, covenants, conditions, representations or warranties pursuant to this Lease, where such failure is not remedied timely, as provided in Paragraph 20, below, upon written notice thereof from the nonbreaching party to the breaching party.

20. **Default, Remedies.** In the event that DOE defaults in performing any provision in this Agreement, Broomfield shall give written notice of the default by mailing or hand-delivering same to DOE. If such a default is not cured within thirteen (13) calendar days after mailing the notice or within (10) calendar days after hand delivery of the notice, then Broomfield shall have the right to pursue whatever other remedies are available under this Agreement, Colorado law, and federal law, including, but not limited to, specific performance. In the event of default by Broomfield, DOE shall give written notice of the default by mailing or hand-delivering same to the City. If such a default is not cured within thirteen (13) calendar days after mailing the notice or within (10) calendar days after hand delivery of the notice, then DOE shall have the right to pursue whatever other remedies are available under this Agreement, Colorado law, and federal law, including, but not limited to, specific performance.

21. **Waiver.** The waiver of a breach of any of the provisions of this Agreement in any particular instance shall not constitute a waiver of future similar breaches of that provision or a waiver of other provisions of this Agreement. No covenant or obligation by or of a party may be waived except by the written consent of the other party.

**22. Damages.** Should DOE take delivery, including delivery by exchange, of the Leased Water into storage facilities owned by DOE, including the ponds described in paragraph 5, Broomfield shall not be liable or responsible for any consequential, incidental or special damages related to the Leased Water provided under this Agreement.

Except as provided in the preceding sentence, DOE shall not be liable or responsible for any consequential, incidental or special damages related to Broomfield's storage or release of water on behalf of DOE as described in paragraph 4.

**23. Governmental Immunity.** The parties understand and agree that the monetary limitations and all other rights, immunities and protections provided by the Colorado Governmental Immunity Act, CRS § 24-10-101 *et seq.*, and , Federal Tort Claims Act, 28 U.S.C.A. § 2671 through 2679, each as amended from time to time, may apply to actions arising from or related to this Agreement.

**24. Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of Colorado and the United States of America. Venue for any dispute under this Agreement shall be in the United States District Court for the District of Colorado or such other Court as provided by law.

**25. Headings for Convenience Only.** The headings, captions and title contained herein are intended for convenience and reference only and are not intended to define, limit or describe the scope of intent of any of the provisions of this Agreement.

**26. Notice.** Any correspondence, notice, demand or request relating to this Agreement will be effective only if hand-delivered or mailed, certified and return receipt requested, to the following addresses, or such other address as the parties may designate in writing, hand-delivered or sent by certified mail, return receipt requested:

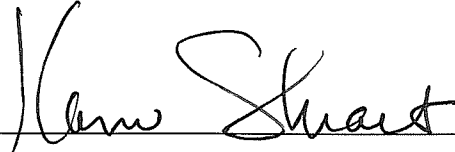
- |    |                   |  |
|----|-------------------|--|
| a. | If to Broomfield: | City and County of Broomfield<br>Attention: Director of Public Works<br>One DesCombes Drive<br>Broomfield, CO 80020  |
|    | With a copy to:   | Harvey W. Curtis, Esq.<br>Attorney at Law<br>8310 South Valley Highway, Suite 230<br>Englewood, CO 80112   |
| b. | If to DOE:        | Department of Energy<br>Rocky Flats Project Office<br>Attention: Frazer Lockhart<br>12101 Airport Way Unit A<br>Broomfield, CO 80021                         |
|    | With a copy to:   | United States Department of Justice<br>Environmental and Natural Resources Section<br>999 18 <sup>th</sup> Street, Suite 945 North Tower<br>Denver, CO 80202 |

27. **Modification.** No modification of the Agreement may be made except by a writing executed by both parties, and approved by formal authority of the governing body of Broomfield and the governing body of DOE, or its designee.

28. **Benefit.** Notwithstanding any benefits which may incidentally accrue to other parties because of this Agreement, this Agreement is solely for the benefit of the parties hereto, and no third party shall be entitled to claim any rights hereunder or enforce any provision of this Agreement.

**IN WITNESS WHEREOF** the parties hereto have caused the Agreement to be executed the day and year first above written.

THE CITY AND COUNTY OF BROOMFIELD,  
A Colorado municipal corporation and county



Mayor  
One Descombes Drive  
Broomfield, CO 80020

ATTEST:

  
City Clerk Deputy

APPROVED AS TO FORM:

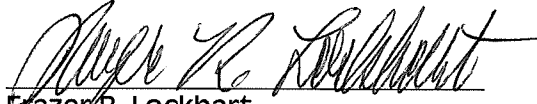


City & County Attorney

FOR THE U.S. DEPARTMENT OF ENERGY:



Vincent A. LeDuc  
Real Property Officer  
U.S. Department of Energy  
Environmental Management Consolidated  
Business Center  
250 E. Fifth Street  
Cincinnati, OH 45202  
513-246-0599



Frazer R. Lockhart  
Manager  
U.S. Department of Energy  
12101 Airport Way, Unit A  
Broomfield, CO 80021

# APPENDIX A

## Estimated Gross Evaporation Rates – Rocky Flats Environmental Technology Site

Month	Monthly Distribution of Annual Evaporation <sup>(a)</sup>	NOAA TR-33 Annual Evaporation <sup>(b)</sup> Distributed Monthly (inches/month)	NOAA TR-33 Annual Evaporation <sup>(b)</sup> Distributed Daily (inches/day)
January	3.0%	1.17	0.038
February	3.5%	1.37	0.049
March	5.5%	2.15	0.069
April	9.0%	3.51	0.117
May	12.0%	4.68	0.151
June	14.5%	5.66	0.189
July	15.0%	5.85	0.189
August	13.5%	5.27	0.170
September	10.0%	3.90	0.130
October	7.0%	2.73	0.088
November	4.0%	1.56	0.052
December	3.0%	1.17	0.038
<b>Annual Total</b>	<b>100.0%</b>	<b>39.00</b>	

### References:

a) General Guidelines for Substitute Supply Plans for Sand and Gravel Pits

Submitted to the State Engineer Pursuant to SB 89-120 and SB 93-260

b) NOAA Technical Report NWS 33

Evaporation Atlas for the Contiguous 48 United States, June 1982.

(Annual estimated free water surface evaporation for RFETS area is 39 inches)